ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

ORIGINAL
FILE

In the Matter of	)	
	)	
Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-259
and Competition Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF
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On behalf of the cable operators and associations listed on the signature page.

January 4, 1993

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SUMMARY

Notwithstanding the pending litigation concerning must carry and retransmission consent, Cole, Raywid & Braverman submits these Comments to assist the Commission in this rulemaking. The Comments emphasize the importance of maximizing administrative efficiency and operator discretion wherever possible. While a panoply of issues are addressed in the Comments, key points include:

MUST CARRY

Each cable system should be assigned initially to a single market in order to determine which television broadcast stations will be considered "local" for the purpose of commercial must carry. Market designations should be based on the location of the cable system's principal headend. Although the statute references Arbitron's ADI designations, the Commission is the ultimate authority and must rule on any changes from present ADI assignments.

With regard to non-commercial must carry, the Commission should adopt standards for the delivery of "good quality" signals matching the statutory standards specified for commercial stations. Signal delivery should be measured at the system headend.

The statute clearly leaves stations invoking must carry with responsibility for the costs of providing a good quality

signal to the system headend, as well as any copyright costs associated with carriage. The Commission should emphasize that the operator has final discretion as to the system's technical operation and copyright calculation. Must carry candidates must accommodate operator decisions in these areas and must provide adequate indemnification where requested.

The statute also allows cable operators to refuse must carry requests involving substantially duplicating signals. A station should be regarded as "substantially duplicating" if it duplicates either 50% of total weekly broadcast hours or 50% of primetime hours.

An operator's must carry obligations vary depending on the number of "activated channels." That term should be interpreted, consistent with a federal court decision, to encompass only those channels that can be delivered to subscribers without any additional capital expenditure.

The Commission should recognize that the statute affords broadcasters relatively limited channel positioning rights. Even then, a system's operational constraints -- such as providing a basic service on channels 2-13 -- must take precedence over a broadcaster's request for an upper tier channel position.

RETRANSMISSION CONSENT

Retransmission consent could be extremely disruptive to cable's delivery of broadcast signals. For retransmission consent to work at all, the Commission must carefully distinguish it from copyright, and leave the broadcaster (not the programmer) with sole authority to grant or deny retransmission consent.

Retransmission consent applies to all multichannel video program distributors, but can be invoked only by originating television stations.

A station invoking retransmission consent must understand that its election of retransmission consent is generally binding for three years, and that it may ultimately fail to secure carriage. To the extent a station, otherwise eligible for must carry, is carried pursuant to retransmission consent, the operator can count that station towards its must carry quota.

By and large, retransmission consent calls for free-market negotiations. The Commission should, however, limit those negotiations in cases involving "smaller" systems and systems with "overlapping" service areas. The statute also requires the Commission to consider petitions alleging that a broadcaster's retransmission consent demands would lead to unreasonable basic service rates.

Finally, Cole, Raywid & Braverman proposes a specific implementation schedule, from May 3, 1993 to October 5, 1993, for both must carry and retransmission consent that will discourage delay and minimize disruption of service to cable subscribers.

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COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CR&B"), on behalf of the cable operators and associations listed below, hereby submits these Comments on the FCC's Notice of Proposed Rule Making ("NPRM") concerning the adoption of new "must carry" and "retransmission consent" rules.

Introduction

The Cable Television Consumer Protection and Competition Act of 1992 (the "Act") imposes requirements which fundamentally alter the relationship between cable television systems and broadcast stations. Sections 4 and 5 of the Act mandate cable carriage of designated commercial and noncommercial stations, while Section 6 confers alternative authority on commercial broadcast stations to negotiate the terms of carriage. These provisions are referred to as "must carry" and "retransmission consent."

CR&B notes that must carry and retransmission consent are already subject to pending litigation, and submits that neither provision will withstand judicial review.[1/] CR&B appreciates, however, that the Commission has been instructed by Congress to fashion implementing regulations. These comments are submitted to assist in that task. CR&B's involvement in this proceeding is not intended as an endorsement of either must carry or retransmission consent, nor should these Comments be construed as somehow waiving any legal challenge to these new requirements.

In crafting rules to implement must carry and retransmission consent, the Commission must follow two fundamental principles. First, the rules should be drafted to maximize administrative ease and efficiency. This is critical to minimizing the burden on both the Commission and the cable industry. Second, the rules should allow the cable operator maximum flexibility and choice in compliance. The operator is, after all, at great business risk in implementing these requirements. These rules affect the cable product, as well as the underlying relationship between the cable operator and its customers.

1/ Turner Broadcasting System, Inc. v. F.C.C., Civ. No. 92-2247 (D.D.C. 1992); Daniels Cablevision, Inc. v. U.S., Civ. No. 92-2292 (D.D.C. 1992).

Must carry has a particularly suspect history, having twice been struck down in prior administrative versions as unconstitutional. Quincy Cable TV, Inc. v. F.C.C., 768 F.2d 1434 (D.C. Cir. 1985) (per curiam), cert. denied 476 U.S. 1169 (1986); Century Communications Corp. v. F.C.C., 835 F.2d 292 (D.C. Cir. 1987), clarified, 837 F.2d 517 (1988), cert. denied, 486 U.S. 1032.

I. MUST CARRY

A. Cable Systems Should Be Assigned Initially To A Single Television Market

The NPRM begins its discussion of commercial must carry by soliciting comments on the definition of "local commercial television stations." Congress was fairly clear on this point, and the statutory provision can be incorporated into the regulation with little change. In fact, the only real difficulty here is determining which stations are "local" to which systems. To resolve that issue, the Commission must initially establish a mechanism for identifying the "location" of each cable system.

Cable systems often cover a large geographic area. As cable operators increasingly use fiber to technically integrate separately operated systems, the size of cable systems will continue to grow. As that happens, more and more systems will extend beyond a single television market.

CR&B submits that the physical location of the entire cable system is not the best test for implementing must carry. The structure of the 1992 Cable Act's must carry scheme suggests that Congress intended that a cable system would be located in just one television market, and that normally only the commercial television stations licensed to that market would be entitled to must carry status.

The point is perhaps best illustrated by considering the statutory provision allowing the FCC, upon petition, to reassign the market status of a particular cable community. Section 614(h)(1)(c)(i) specifically provides, "In considering such requests, the Commission may determine that particular communities are part of more than one television market." That provision implies that, absent an affirmative FCC determination, each community should be assigned to a single market. But if the Commission defines the location of a system by its entire territory, the individual communities in a system straddling a market boundary would, for all practical purposes, have been initially assigned to two markets.

1. Market Assignments Should Be Based On The Location Of The Principal Headend

For the purposes of the commercial must carry rules, CR&B proposes that the location of a cable system be defined by the location of its principal headend. This test would provide a fixed, readily identifiable point at which to locate the system and identify its television market. And it would entirely avoid the problem of dual market assignment. The headend location test has the added advantage of matching the test used for noncommercial must carry purposes, thereby fostering administrative ease. See 47 U.S.C. § 535(1)(2)(A). It also matches the test Congress adopted to decide which of two commercial networks stations is "closer" to the cable system and, thus, entitled to

carriage priority. See 47 U.S.C. § 534(b)(2)(B). The Commission should follow Congress' lead and recognize the headend location as the best test for defining cable system location.

Assuming the Commission adopts the principal headend approach, it must then decide how that facility will be identified.[2/] The designation of a principal headend is most critical in cases where a system operates in a multiple headend configuration.[3/] CR&B supports the Commission proposal that the operator should make the initial designation of the system's principal headend.[4/] As the NPRM suggests, any party opposing the designation would have the burden of convincing the Commission that the

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2/ Even if the Commission decides against the principal headend approach for purposes of commercial must carry, it must address this issue for purposes of non-commercial educational ("NCE") must carry. As noted above, Section 615, addressing NCE must carry, expressly adopts the principal headend approach.

3/ Where an operator has the technical ability to carry different broadcast signals on different portions of an integrated system and wishes to do so, it should be allowed to proceed on that basis. In those cases, the operator should designate multiple "principal headends" for purposes of must carry implementation.

4/ A system's "receive" site, where antenna first pick up terrestrial or satellite signals, is sometimes geographically separate from its "headend," from which signals are transmitted outbound to subscribers. Although the broadcasters' obligation should be in terms of the "headend," serving that facility may, as a practical manner, best be accomplished by serving a separately established "receive" site. Each operator must retain sole authority to construct and operate its reception and distribution plant in the location and matter it sees fit. Broadcasters invoking must carry must accommodate those decisions.

designation was made for the primary purpose of circumventing must carry obligations.

In an effort to minimize the paperwork burden on both the cable industry and the Commission, an operator's principal headend designation should simply be recorded in each system's public file and provided in response to a specific inquiry. If the Commission feels obligated to serve as a clearinghouse, CR&B urges it to consider relying on existing reports (e.g., FCC Form 320).[5/]

Cable operators should also be extended the right to make unilateral changes in principal headend designations to accomodate technological changes, rebuilds, and relocations. These changes should be effective immediately, subject either to changing the designation in the public file or notifying the Commission. Any such changes would, of course, be subject to challenge at the Commission if any interested party could show that the change was made for the primary purpose of circumventing must

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5/ CR&B believes that the vast majority of cable system locations will be obvious without even considering the "principal headend" issue. A universal filing requirement should, therefore, be rejected as inefficient.

In contrast, CR&B supports the suggestion in the NPRM that the Commission update the list of broadcast reference points identified in Section 76.53. There are literally scores of broadcast communities not included in the current list. While the reference points for these communities can be independently obtained, a very modest effort on the Commission's part would quickly produce helpful results.

carry obligations.[6/]

B. The Commission Must Assume Ultimate Authority For Market Designations

In defining a television market for commercial must carry purposes, Congress referred to Section 73.3555(d)(3)(i) of the Commission's rules, which in turn incorporates the "Area of Dominant Influence" (ADI) analysis created by a private entity, the Arbitron Company. Notwithstanding this statutory reference, it would be entirely inappropriate, however, to defer entirely to a private business to dictate communications policy. Arbitron designations must be subject to Commission review.[7/]

CR&B suggests that Arbitron's current designations be adopted into the must carry rules, subject to petitions for modification. Future changes in Arbitron's designations should have no effect on must carry, unless and until the Commission

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6/ To minimize the likelihood of arbitrary results, operators should have unilateral authority to deviate from the "principal headend" approach in those areas where the majority of system subscribers reside in a different ADI than the one in which the "principal headend" is situated.

7/ The Commission specifically seeks comment as to locations outside the continental United States which currently lack an ADI designation. Arbitron explains in its "Description of Methodology" Manual (December 1991) that "survey areas in Alaska, Hawaii, territories or possessions may be designated ADI's if stations subscribe to Arbitron's service." One obvious solution is to require stations outside the continental United States to subscribe to Arbitron's service and establish an ADI prior to seeking must carry rights.

determines, in response to a petition and after considering all relevant facts, that circumstances warrant an adjustment. Only at that time would the Commission's original ADI list be updated.

Of course, the Commission is free to make adjustments to its market list independent of Arbitron and on a less than countywide basis. Congress has expressly authorized the Commission to add communities to or subtract communities from a television station's market, pursuant to criteria set forth at Section 614(h)(1)(C)(ii).

CR&B supports the NPRM proposal that the Commission give expedited consideration to all market designation petitions. The existing special relief procedures under Section 76.7 would ideally serve this function. The Commission should clarify, however, that adjustments in a particular cable community's designation are ordinarily to be made based on overall market circumstances, rather than on a station-by-station basis. Indeed, the House Report states, "[T]his Section is not intended to permit a cable system to discriminate among several stations licensed to the same community." H. Rep. 628, 102d Cong. 2d Sess. at 98 (1992).

This clarification will avoid a possible deluge of petitions in which cable operators and broadcasters contest carriage of particularly strong or particularly weak market stations. The only exception to this approach should be cases where

a single market signal originates from a point quite distant from any other market signal.[8/]

A system's market designation directly impacts an operator's carriage obligations. When there is uncertainty about that designation, it would be bad public policy to insist that the operator change its channel lineup. Such change might prove unnecessary, and serve only to increase subscriber disruption and confusion. Accordingly, Commission rules should provide that as long as a bona fide petition for market redesignation is pending at the Commission, the operator can lawfully defer implementation of any must carry obligations that might be affected by the outcome of the proceeding. Once a final decision on market designation is made, cable operators should have an additional 90 days to comply by adding and/or deleting broadcast stations.[9/]

8/ For example, WYVN, licensed to Martinsburg, West Virginia, is included in the Washington, D.C. ADI.

9/ It must be remembered that Congress has designated four months out of the year during which no changes can be made. 47 U.S.C. § 534(b)(9). Cable operators also have notice requirements to comply with before making signal changes. See 47 U.S.C. §§ 534(b)(9); 535(g)(3); 544(h)(1). More troubling still, cable's compulsory copyright payments are calculated on a semi-annual basis. If a system carries a signal for any portion of a six month accounting period, it must calculate its copyright payments as if the signal were carried for the entire accounting period. As a result, cable systems typically change their distant signal lineup only at the beginning of each new accounting period. Cable operators should be allowed to defer channel changes with copyright consequences until the beginning of the next accounting period.

C. For Purposes Of NCE Must Carry, The Commission Should Set A Specific Signal Strength Level To Measure A "Good Quality" Signal And A Specific Coverage Test To Identify Qualified Translators

The statute provides that NCE must carry eligibility requires the delivery of a "good quality" signal to a cable headend, but does not quantify what that signal level should be. The Commission should simply borrow from the commercial must carry rules and adopt an off-air standard of -45 dBm for UHF and -49dBm for VHF.[10/]

The statute is also imprecise in describing the local zone of an otherwise qualified NCE translator. While the reference to "serving the franchise area" is similar to earlier regulatory provisions,[11/] the Commission should use this opportunity to offer a brightline test for purposes of administering the law. Because the new must carry provision for full power NCE stations focuses on principal headend location (rather than system boundaries), the provisions concerning NCE translators should reflect that same approach. An NCE translator should be eligible for must carry only if its signal consistently delivers to the operator's principal headend an **off-air** signal level of -45 dBm for UHF and -49 dBm for VHF.

10/ There is no reason to establish a different technical standard for commercial and noncommercial stations, and the FCC adopted the -45/-49 dBm test in its last set of must carry rules. See § 76.56 (1986).

11/ See 47 C.F.R. § 76.57 (1984).

D. Must Carry Broadcasters Must Accept Responsibility For The Cost Of Carriage

Every broadcast station located in the same television market as a cable system is not necessarily eligible for must carry. The statute excludes certain "local" stations, unless they are prepared to compensate the cable operator for any costs incurred in delivering a good quality signal to the headend and any copyright costs associated with carriage. 47 U.S.C. § 534(b)(10).[12/]

Copyright compensation is likely to cause the most confusion, because the existing copyright royalty calculation is already extremely complicated, and the new differences between being "local" for must carry and "local" for copyright will only exacerbate misunderstandings. For example, a commercial station is generally regarded as "local" for copyright purposes within a 35-mile zone around its community reference point and in those areas in which it is "significantly viewed." In some cases, a station's ADI (which defines "local" under the new commercial must carry rules) will extend well beyond either of these copyright measures. The Commission should make it clear that must carry eligibility is contingent upon the broadcaster paying any

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12/ In the case of NCE must carry, initial eligibility is determined not by "market" location, but by a 50-mile/grade B zone. 47 U.S.C. § 535(l)(2). In addition, the statute excludes certain NCE stations from responsibility for copyright. 47 U.S.C. § 535(i)(2).

and all copyright royalty fees under Section 111 of the Copyright Act associated with the carriage of its station.

Broadcasters must not be allowed to avoid or limit their copyright responsibility by restricting their signal carriage request to particular communities within a cable system. Cable operators are under no obligation to limit signal carriage (and the resulting copyright consequences) by "trapping" a must carry signal out of particular communities within a technically-integrated "contiguous" cable system. Indeed, broadcasters should understand that copyright regulations sometimes require operators to consolidate two non-integrated systems into a single copyright filing. Again, the broadcaster invoking must carry in any portion of those systems must accept full copyright responsibility. This would, after all, be "the incremental costs incurred by the cable operator as a result of its carriage of the station." H. Rep. at 103.

The Commission should further clarify that it is up to the cable operator to designate which "distant" signal is responsible for which "incremental" copyright cost. This is critical, because cable systems pay dramatically different incremental copyright fees depending on the number and type of distant signals carried. Adding one more "must carry" station, with a "distant" copyright designation, could cost as little as .066%, or as much as 3.75%, of system "gross receipts, depending upon which

signals are classified as the system's "quota" signals."[13/] Unless the operator can make the designation itself, every "must carry" broadcaster will claim it is responsible for the lowest amount -- rather than the 3.75% "penalty" its carriage demand has actually created -- and the cable operator could be left with a staggering shortfall.

Cable operators must also have the flexibility to secure copyright indemnification in advance, even in those cases where it is unclear whether there will be any copyright consequences. For example, a smaller system, that currently pays copyright on a flat basis (regardless of signal carriage) may be concerned that its "gross receipts" during the next accounting period will push it over the "small system" cut-off ($292,000 per accounting period), thereby requiring subsequent copyright calculations on a signal specific basis.

Finally, the cable operator should be allowed to impose reasonable measures on the broadcaster's indemnification to ensure it is more than a meaningless piece of paper. In some cases, operators may require broadcasters to place funds in escrow, post a performance bond, or issue a letter of credit.[14/]

13/ "Gross receipts" for compulsory copyright purposes is defined at 17 U.S.C. § 111(d).

14/ Cable operators should cooperate with broadcasters in trying to determine their likely copyright exposure, but the ultimate determination of copyright exposure should rest with the operator affected by a must carry demand.

The regulations should make it clear that these requirements are not affected by the statutory limit on payment for carriage.

E. Substantial Duplication And Must Carry Eligibility Should Be Defined In Terms Of A 50% Primetime / 50% Total Broadcast Cut-Off

The NPRM specifically addresses the statutory provision allowing cable operators to refuse carriage to otherwise qualified stations that "substantially duplicate" the programming of another station already being carried on the system. The exception reflects congressional understanding that mandatory carriage of "substantially duplicating" stations is of little value.[15/]

CR&B submits that "substantial duplication" should be defined as duplication of 50% or more of a station's total weekly programming or 50% or more of its primetime programming. Although primetime hours represent a modest percentage of the broadcast day, they account for the majority of television viewing. It would make no sense to allow a station to meet its "diversity" obligation entirely during low viewership hours, and then air strictly duplicative programming during primetime hours. A focus solely on primetime hours, rather than total broadcasting hours, would be similarly inappropriate. A station could then devote a relatively small percentage of its total weekly

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15/ See, e.g. 47 U.S.C. § 535(e) (the FCC should administer this area in a fashion that "promotes access to distinctive noncommercial educational services").

programming to unduplicated programming and still qualify for must carry by placing all that unduplicated programming during primetime. A station seeking to invoke must carry should be expected to satisfy both parts of this two-prong test.[16/]

The 50% threshold should be enforced, regardless of whether the duplicated programming is aired simultaneously.[17/] The duplication cut-off applicable for commercial stations should also be applied to both of the duplication exceptions applicable to NCE stations. See 47 U.S.C. §§ 535(b)(3)(C) and 535(e). [18/]

16/ CR&B recommends this same 50% primetime/50% total broadcast cut-off for municipally owned stations seeking NCE must carry status.

17/ Stations sometimes air the very same programming at different times. One local station might, for example, air a program at 8 p.m., while another local station airs the very same programming at 9 p.m. Stations should not be allowed to escape a "substantially duplicating" designation by such time shifting.

18/ The Commission should clarify the NCE must carry requirements for systems with more than 36 channels. The statute does not expressly provide a special carriage exception in that context for duplicating NCE stations affiliated with the same state public television authority. That exception is, however, addressed in the context of mid capacity (13-36 channel) systems and is logically applicable to large capacity systems as well. The Commission should construe the large capacity carriage obligations to implicitly incorporate the NCE state network exception.

F. Broadcasters Must Affirmatively Request Carriage And Represent That They Do Not Predominantly Air Sales Presentations And Program Length Commercials

The Commission's interest in seeing must carry implemented in an efficient manner compels it to require all broadcasters interested in must carry to affirmatively notify cable operators of their interest and fully document their eligibility. Pending final rulemakings and determinations by the Commission, each commercial station requesting carriage must certify that it is not predominantly utilized for the transmission of sales presentations or program length commercials. The same dual test of "fifty percent of the broadcast week" or "fifty percent of primetime hours" suggested for the "substantial duplication" rule is appropriate in this context.

G. The Commission Should Review LPTV Must Carry Eligibility On A Case-By-Case Basis

The definition of "qualified low power television station" contained in the Act may be incorporated directly into the rules. The objective criteria (e.g., market size, presence of a full power station) will severely restrict the number of LPTV stations potentially eligible for must carry. For those relatively few LPTV stations that can pass that initial hurdle, and are not voluntarily carried on the local cable system, the Commission should pursue a case-by-case determination of must carry eligibility. Indeed, the statutory language suggests the

decisions should be based on a Commission "determin[ation]" rather than pursuant to Commission regulation. 47 U.S.C. § 534(h)(2)(B). At present, the Commission need only make clear that an LPTV requesting carriage has the full burden of demonstrating to the cable operator and the Commission that it qualifies for carriage, and that an operator need not carry the LPTV station until an eligibility certification is issued by the Commission.[19/]

H. All Broadcast Signals Need Not Be Carried In Their Entirety

Section 614(b)(3)(B) states that a cable operator "shall carry the entirety of the program schedule of any television station carried on the cable system." It is unclear whether, as the language suggests, that requirement is really meant to apply to all television stations. The difficulty arises because the provision is included within a statutory section devoted to commercial must carry. CR&B submits that the requirement was intended only to apply to stations carried pursuant to commercial must carry.

Regardless of the initial application of Section 614's content specifications, the implementing regulation should permit

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19/ Must carry obligations should not apply for 90 days after the Commission certification. This is the same transition period recommended for newly eligible full power stations.